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Beyond Workers' Compensation: Workplace Comparative Fault and Third-Party Claims

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BEYOND WORKERS' COMPENSATION: WORKPLACE COMPARATIVE FAULT AND THIRD-PARTY CLAIMS

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INTRODUCTION

Injured workers in America look to workers' compensation to cover their basic losses. Payment of medical bills, partial defraying of wage losses, and some compensation for temporary or permanent disability is usual throughout the country. Workers' compensation does not cover all potential loss that the worker incurs, however, such as full hedonic damages, which are foreign to the concept of workers' compensation.

With few exceptions,[1] workers' compensation bars suits against employers and co-workers, but not against third parties who, through their negligence or the operation of defective products, may have contributed to an employee's injury. An employee generally bases his third-party claim on products liability law[2] and asserts that claim against the manufacturer,[3] distributor,[4] seller,[5] inspector,[6] assembler,[7]

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1. *See* William A. Dreier & Lawrence N. Lavigne, *Untying the* Laidlow *Knot*, 170 N. J. L. J. 810, 810 (2002). In sharply constricted situations, an employer may be responsible in excess of his workers' compensation liability in two primary areas: intentional injuries, see, e.g., *Laidlow v. Hariton Mach. Co.*, 790 A.2d 884, 887 (N.J. 2002), and in some applications of the dual capacity doctrine. *See, e.g.*, Colwell v. Allstate Ins. Co., 819 A.2d 727, 736 (Vt. 2003). Courts also refer to the dual capacity doctrine using the term "dual persona" doctrine. *Id.*

2. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1997).

3. *See, e.g.*, Promaulayko v. Johns Manville Sales Corp., 562 A.2d 202, 205 (N.J. 1989).

4. *Id.*

5. *Id.* At least in New Jersey, a statute limits a seller's liability. N.J. STAT. ANN. § 2A:58C-9 (West 2000).

6. *See, e.g.*, Calderon v. Machinenfabriek Bollegraaf Appingedam BV, 667 A.2d 1111, 1115-16 (N.J. Super. Ct. App. Div. 1995).

7. *See, e.g.*, Zaza v. Marquess & Nell, Inc., 675 A.2d 620, 634 (N.J. 1996).

lessor,[8] or rebuilder[9] of a piece of equipment that the employee operated or with which he otherwise came into contact.

Unless otherwise barred, third-party defendants generally will assert a defensive claim of contributory or comparative negligence if the plaintiff played any part in causing his own injury.[10] In some jurisdictions, the employee's own fault may absolutely bar or partially offset recovery.[11] In other jurisdictions, however, courts may largely overlook the employee's fault.[12] Although *Restatement (Third) of Torts: Products Liability* discusses products liability in detail, the reporters' comments only lightly treat the subject of the effect of a worker's fault on a third-party claim.[13]

This Article begins by exploring the varying standards that the courts throughout the United States employ to assess a worker's contributory or comparative negligence. Part II compares the unique refusal of New Jersey and Ohio courts to recognize the majority's approach to an employee's fault when he becomes injured while working with a defective product.[14] Finally, Part III posits that this refusal may not be as limiting as it initially appears.

I. THE VARYING TREATMENT OF EMPLOYEE CONDUCT IN THIRD-PARTY INJURY CLAIMS

Cases that address how a worker's fault impacts third-party claims fall into four main categories. Under the first approach, an employee's contributory negligence bars the claim.[15] In the second category, the court compares the worker's fault to that attributed to

8. *See, e.g.*, Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769, 781 (N.J. 1965).

9. *See, e.g.*, Michalko v. Cooke Color & Chem. Corp., 451 A.2d 179, 187-88 (N.J. 1982), *modified on other grounds*, *Zaza*, 675 A.2d at 627.

10. *See infra* Parts I.A., I.B.

11. *See infra* Part I.

12. *See infra* Part I.

13. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. A, illus. 19 (1997).

14. *See* Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140, 148 (N.J. 1979); Cremeans v. Willmar Henderson Mfg. Co., 566 N.E.2d 1203, 1208 (Ohio 1991). Although New Jersey was the first state to adopt this position, Justice Burke of the Alaska Supreme Court first advocated this position in his dissenting opinion in *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 47 (Alaska 1976).

15. *See infra* Part I.A.

the product.[16] Under the third approach, if the worker has unreasonably assumed the risk of a known danger in his use of the product, his conduct offsets the third party's liability on a comparative basis.[17] In the fourth category, the worker's negligent conduct will not affect his recovery if he reasonably assumed that his employer assigned the task and that he had no meaningful choice except to proceed in the face of the known danger.[18]

A. The Contributory Negligence Standard

The common law doctrine of contributory negligence bars a plaintiff's recovery when the plaintiff's own negligence contributed to his injury. The latter half of the 20th century saw the gradual eradication of this doctrine, as states either judicially or legislatively replaced contributory negligence with the concept of comparative fault.[19] At the time of this publication, only four states still employ or purport to apply contributory negligence as a complete bar to a plaintiff's claim.[20]

Alabama, North Carolina, and Virginia have retained the strict contributory negligence standard, under which the plaintiff's unreasonable conduct trumps a breach of the manufacturer's duty, even in the employment context.[21] Maryland, though nominally a contributory negligence state, actually applies an assumption of risk standard.[22]

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16. *See infra* Part I.B.

17. *See infra* Part I.C.

18. *See, e.g., Suter*, 406 A.2d at 148; *see also Cremeans*, 566 N.E.2d at 1207 (demonstrating that the Illinois interpretation of assumption of risk approaches this standard).

19. Several states have adopted comparative negligence by judicial decision. *See* Kaatz v. State, 540 P.2d 1037, 1049 (Alaska 1975); Li v. Yellow Cab. Co., 532 P.2d 1226, 1243 (Cal. 1975); Hoffman v. Jones, 280 So. 2d 431, 436 (Fla. 1973); Hilen v. Hays, 673 S.W.2d 713, 720 (Ky. 1984); Placek v. City of Sterling Heights, 275 N.W.2d 511, 519 (Mich. 1979); Gustafson v. Benda, 661 S.W.2d 11, 15-16 (Mo. 1983); Scott v. Rizzo, 634 P.2d 1234, 1236 (N.M. 1981); Bradley v. Appalachian Power Co., 256 S.E.2d 879, 890 (W. Va. 1979).

20. *See infra* Part II.A., notes 21-32 (Alabama, North Carolina, Virginia); Part II.C., note 54 and accompanying text (noting that Maryland permits assumption of risk as a bar only in products liability cases).

21. *See* Gen. Motors Corp. v. Saint, 646 So. 2d 564, 568 (Ala. 1994); Alston v. Monk, 373 S.E.2d 463, 466 (N.C. Ct. App. 1988); Hoar v. Great E. Resort Mgmt., 506 S.E.2d 777, 787 (Va. 1998).

22. *See* Balt. Gas & Elec. Co. v. Flippo, 705 A.2d 1144, 1155-56 (Md. 1998).

Alabama, a strict contributory negligence state, completely bars recovery for injuries that resulted from the plaintiff's own negligence, misuse of a product, or assumption of risk.[23] Alabama allows as a defense the plaintiff's assuming the risk of a known defect or danger.[24] The sole ameliorating factor is that Alabama follows *Restatement (Second) of Torts* section 402A,[25] which defines assumption of risk as proceeding *unreasonably* in the face of a known defect or danger.[26] Thus, a court might find that a plaintiff did not proceed unreasonably when forced by the economic circumstances of his employment to work on a machine that he knew to be unsafe.

Like Alabama, North Carolina statutorily recognizes assumption of risk and contributory negligence as complete bars to recovery in products liability actions.[27] In fact, North Carolina jury instructions go so far as to apply contributory negligence to any claim of defect in manufacture, design, or warning.[28]

Virginia has never adopted *Restatement (Second) of Torts* section 402A and does not permit strict liability as a basis for recovery in a products liability case.[29] Virginia courts use the doctrine of contributory negligence as a bar to all recovery in negligence actions because Virginia law does not provide for recovery in a system of comparative fault.[30] Assumption of risk is likewise a complete defense, but courts have lessened its impact by requiring defendants to prove that plaintiffs both fully appreciated and voluntarily

23. *See Saint*, 646 So. 2d at 568.

24. *See, e.g.*, Atkins v. Am. Motors Corp., 335 So. 2d 134, 137 (Ala. 1976).

25. RESTATEMENT (SECOND) OF TORTS § 402A (1965); *see infra* text accompanying notes 44-45.

26. *Atkins*, 335 So. 2d at 143.

27. *See, e.g.*, N.C. GEN. STAT. §§ 99B-4(2) to (3) (1995). Contributory negligence is a complete defense to both negligence and breach of implied warranty. *See, e.g.*, Nicholson v. Am. Safety Util. Corp., 488 S.E.2d 240, 244 (N.C. 1997).

28. N.C. PATTERN JURY INSTRUCTIONS FOR CIVIL CASES 750.23 & 755.60 (1984) (N.C. Conference of Super. Ct. Judges, Comm. on Pattern Jury Instructions) [hereinafter Conference of Judges].

29. *See, e.g.*, Sensenbrenner v. Rust, Orling & Neale Architects, Inc, 374 S.E.2d 55, 57-58 n.4 (Va. 1988). However, federal courts have found that Virginia's warranty theory of liability constitutes the functional equivalent of strict liability. *See* Abbot v. Am. Cyanamid Co., 844 F.2d 1108, 1114 (4th Cir. 1988).

30. *See, e.g.*, Litchford v. Hancock, 352 S.E.2d 335, 337 (Va. 1987).

accepted the risk.[31] Thus, a plaintiff might argue that he did not act voluntarily, if he had no economically meaningful choice but to continue working on an unsafe machine.[32]

B. The Comparative Fault Standard

Concepts of comparative fault range from pure comparative fault, which allocates liability to each party on a percentage basis unless the plaintiff is 100% negligent, to systems of modified comparative fault, which permit courts to bar recovery when the plaintiff's percentage of fault is at or above 50% or 51%.[33] Most states apply comparative fault standards to products liability claims, either by statute or by case law.[34] Some of these states, tangled in the doctrinal differences between strict liability and negligence, stop short of the protective New Jersey and Ohio doctrines. These states simply refuse to apply comparative fault in strict products liability cases and instead require proof of assumption of risk.[35]

Comparative fault should not present a conceptual problem, except with respect to manufacturing defects, the only class of products liability actions to which strict liability applies.[36] Manufacturers are liable for the presence of their defective products on the market when the products differed from the designs that the manufacturer intended, and they are held strictly liable for the harm that such defects cause.[37] A court cannot apply comparative fault by comparing the manufacturer's conduct with that of the plaintiff because the

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31. *See, e.g.*, Lust v. Clark Equip. Co., 792 F.2d 436, 440 (4th Cir. 1986); Hoar v. Great E. Resort Mgmt., 506 S.E.2d 777, 787 (Va. 1998).

32. *See infra* Part I.C.

33. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 cmt. a (1999); *infra* Part II.B.

34. *See, e.g.*, IND. CODE ANN. § 34-20-8-1 (Michie 1998); Champagne v. Raybestos-Manhattan, Inc., 562 A.2d 1100, 1117 (Conn. 1989). In Michigan, products liability claims are phrased in terms of negligence or warranty, and comparative negligence may apply. MICH. COMP. LAWS ANN. § 600.2959 (West 2000); *see* Young v. E.W. Bliss Co., 343 N.W.2d 553, 556 (Mich. Ct. App. 1983).

35. *See, e.g.*, Kimco Dev. Corp. v. Michael Day's Carpet Outlets, 637 A.2d 603, 607 (Pa. 1993); Phillips v. Duro-Last Roofing, Inc., 806 P.2d 834, 836-37 (Wyo. 1991); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17 cmt. a (citing Pennsylvania and Wyoming cases); *see infra* Part I.C.

36. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1998).

37. *Id.* § 2 cmts. a & 6c; *see also* David G. Owen, *Manufacturing Defects*, 53 S.C. L. REV. 851, 863 (2002).

manufacturer's conduct is not relevant to his liability. Even in this situation, however, a plaintiff who unreasonably contributed to his own injury should bear some portion of the responsibility for his injury. A court may compare the role that a plaintiff's conduct played in causing his injury with the risk of injury inherent in a defective product even though the manufacturer's conduct is not relevant to this analysis.[38]

In products liability actions based on a design or a warning defect, the principal issue for the court is the fault of the worker compared to the reasonableness of the design or the warning.[39] Where the product either is defectively designed or contains a defective warning, the analysis is basically one of negligence, even though the court still uses the rubric of strict liability.[40] Thus, a manufacturer's placement of a defectively designed product (or one with an inadequate warning) on the market can readily be compared with the conduct of the plaintiff under a standard jury charge. The court can devise an appropriate jury charge if the jurisdiction's law limits the plaintiff's liability to assumption of risk or another relevant doctrine.

Plaintiff-friendly states and liberal commentators generally favor a strict liability rubric, while manufacturer-oriented jurisdictions and

38. For example, an employee observes a crack in the head of a hammer, recognizes the danger of the head splitting, and proceeds to use the hammer. If a metal splinter then injures his eye, he should have the risk of injury created by his conduct evaluated against the risk of injury created by the manufacturer.

39. Early products liability cases overlooked the negligence basis for design and warning defects. *See, e.g.*, Berkebile v. Brantly Helicopter Corp., 337 A.2d 893, 902 (Pa. 1975). A categorical statement that the conduct of the manufacturer is irrelevant makes little sense given that the definition of "defect" in the design or warning perforce includes the element of how a reasonable manufacturer would have designed or warned against improper use of the product. *Restatement (Third) of Torts: Products Liability* makes explicit reference to this concept in its explanation of the "reasonable alternative design" standard. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998). Only the consumer-expectation test states provide any validity to a non-negligence-based test.

40. This principle has been recognized since the days of Dean Prosser's *Restatement (Second) of Torts*. *See* RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965). It is explicitly stated in *Restatement (Third) of Torts: Products Liability*, as well as a legion of cases. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (1998) ("Assessment of a product design in most instances requires a comparison between an alternative design and the product design that caused the injury, undertaken from the viewpoint of a reasonable person. That approach is also used in administering the traditional reasonableness standard in negligence. The policy reasons that support use of a reasonable-person perspective in connection with the general negligence standard also support its use in the products liability context.") (internal citation omitted); 3 AM. L. PRODS. LIAB. 3D § 32:30 n.55 (Timothy E. Travers et al. eds., 1987) (citing cases).

conservative commentators favor a negligence standard.[41] A recent study questioned the bases of these preferences and found that the negligence formulation yielded higher awards.[42]

C. *The Assumption of Risk Standard*

Restatement (Second) of Torts section 402A, which assigns strict liability to sellers of defective products and which is perhaps the single most influential section of all of the Restatements, developed against the background of the prevailing acceptance of the contributory negligence bar.[43] At a time when few states had adopted comparative fault, comment n to section 402A explained:

> *Contributory negligence.* Since the liability with which this [s]ection deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see [section] 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this [s]ection as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.[44]

As expected, many states that adopted the strict liability standards of section 402A also adopted the contributory negligence rules of comment n. When these states abandoned the harsh contributory negligence bar to recovery and adopted the more plaintiff-friendly

41. *See generally* Richard L. Cupp & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N. Y. U. L. REV. 874 (2002).

42. *See id.* at 918-23.

43. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

44. *Id.* § 402A cmt. n.

comparative fault standard either through legislative or judicial change, they did not elect to revise their strict liability standards. A split of authority now exists among the jurisdictions. A majority of the jurisdictions have modified the former contributory negligence bar by applying comparative fault in product liability cases, while a sizeable minority of the jurisdictions continues to require a plaintiff's conduct to rise to the level of assumption of risk before apportioning liability.[45]

Restatement (Second) of Torts illustrates the four definitions of "assumption of risk."[46] This Article uses only the third meaning, under which the plaintiff is "aware of a risk created by the negligence of the defendant [and] proceeds or continues voluntarily to encounter it."[47] This discussion is thus inapplicable where the plaintiff's express consent relieves the defendant of the obligation to exercise care for the plaintiff,[48] where the court regards the voluntary relationship of the parties as a tacit or implied agreement to relieve the defendant of such responsibility,[49] or where the plaintiff's unreasonable encountering of a known risk amounts to contributory negligence.[50] *Restatement (Second) of Torts* section 402A comment n would allow as a defense the subjective voluntariness and the objective unreasonableness of the plaintiff's conduct.[51]

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45. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17(a) cmt. b & Reporters' Note cmt. a (1998) (citing cases).

46. *See* RESTATEMENT (SECOND) OF TORTS § 496A cmt. c (1965).

47. *See id.*; *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3(c) (1997). This form of assumption of risk is applicable in products liability cases. RESTATEMENT (SECOND) OF TORTS § 496C (1965). Although section 496E explains the necessity of "voluntary assumption," it does not treat the economic necessity that may force a worker to use a defective machine with full knowledge of its danger. *Restatement (Third) of Torts*, operating largely in a post-comparative negligence era, leaves the issue to "generally applicable rules." *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17 cmt. d (1997).

48. *See* RESTATEMENT (SECOND) OF TORTS § 496A cmt. c(1) (1965).

49. *See id.* § 496A cmt. c(2).

50. *See id.* § 496A cmt. c(4). Contributory negligence is sometimes confused with the fourth form of assumption of risk. *See id.* § 496A cmt. n. Commentators have declared that the term "assumption of risk" adds "nothing to modern law except confusion." FOWLER V. HARPER & FLEMING JAMES, JR., 2 THE LAW OF TORTS 1192 (1956) (advising abolition of the defense); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68 (5th ed. 1984) (same).

51. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).

Of those states that limit apportionment when a plaintiff has assumed the risk, only Ohio and New Jersey do not generally impose liability upon the employee, even under the assumption of risk standard, if the employee performed a task that he assumed was a requirement of his employment.[52]

Maryland, like its southern neighbors Virginia, North Carolina, and Alabama, does not recognize comparative fault. However, Maryland's application in products liability cases somewhat ameliorates the doctrine. Contributory negligence and assumption of risk are both defenses to negligence claims, and both act as a complete bar to recovery.[53] Maryland courts have softened the doctrine of contributory negligence and have applied a more liberal assumption-of-risk test to strict liability claims.[54] Thus, while contributory negligence is not a defense,[55] assumption of risk is an affirmative defense.[56] If the employee "act[ed] under the compulsion of circumstances . . . which have left him no reasonable alternative," he did not act "voluntarily" for the purposes of the assumption-of-risk test.[57]

Georgia adopted its own statutory basis for strict liability and is emblematic of a risk-utility state that treats assumption of risk as the only defense against a worker's strict liability claim.[58] Georgia's statutory standard provides for strict liability if the product at the time of sale "was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained."[59] As in Maryland, where the use of contributory negligence as a defense is limited to product liability cases, Georgia

52. *See* Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140, 148 (N.J. 1979); Cremeans v. Willmar Henderson Mfg. Co., 566 N.E.2d 1203, 1207 (Ohio 1991). Illinois' interpretation of assumption of risk comes close to this approach. *See infra* text accompanying notes 63-68.

53. *See, e.g.*, Ellsworth v. Sherne Lingerie, Inc., 495 A.2d 348, 356 (Md. 1985); Moran v. Faberge, Inc., 332 A.2d 11, 21 (Md. 1975).

54. *See* ADM P'ship v. Martin, 702 A.2d 730, 740 (Md. 1997).

55. *See, e.g.*, Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 640 n.7 (Md. 1992).

56. *See, e.g.*, Balt. Gas & Elec. Co. v. Flippo, 705 A.2d 1144, 1156 (Md. 1998).

57. *ADM P'ship*, 702 A.2d at 735.

58. *See* Deere & Co. v. Brooks, 299 S.E.2d 704, 707 (Ga. 1983) (describing the risk of the product defect and the risk of physical injuries as types of risks for purposes of assumption-of-risk analysis).

59. O.C.G.A. § 51-1-11(b)(1) (2000).

does not allow that doctrine as a defense in strict liability suits.[60] Assumption of risk requires the defendant to prove that the plaintiff knew of the danger, understood and appreciated its risks, and voluntarily exposed himself to those risks.[61] Missing from this formulation, however, is any consideration of the compulsion that often affects an employee whose employer provided him with a known defective machine with which to work.

Illinois also does not recognize contributory (as opposed to comparative) negligence as a defense to strict liability.[62] Also, "a consumer's unobservant, inattentive, ignorant, or awkward failure to discover or guard against a defect should not be compared as a damage-reducing factor."[63] Otherwise, a plaintiff's comparative fault reduces his recovery.[64] Illinois applies comparative fault in products liability actions where the plaintiff assumed the risk or misused the product in an unforeseeable manner.[65] However, that state does not apply this assumption of risk defense when the plaintiff is an employee.[66] Illinois courts reason that a plaintiff-employee lacks the necessary element of voluntariness when he "assumed such hazards by the mere acceptance of his employment."[67] In some respects, the Illinois rule approaches that of Ohio and New Jersey. By statute, however, Illinois' comparative fault principles were made applicable to strict liability cases.[68]

D. The New Jersey/Ohio Worker-Protective Standard

New Jersey and Ohio not only abolished both contributory negligence and comparative fault as defenses to a worker's claim, but they also do not recognize assumption of risk in most cases. In

60. Ray v. Ford Motor Co., 514 S.E.2d 227, 232 (Ga. Ct. App. 1999).
61. Cotton v. Bowen, 524 S.E.2d 737, 738 (Ga. Ct. App. 1999).
62. Simpson v. Gen. Motors Corp., 483 N.E.2d 1, 3 (Ill. 1985).
63. *Id.*
64. *See* Coney v. J.L.G. Indus. Inc., 454 N.E.2d 197, 204 (Ill. 1983).
65. *See* Perez v. Fid. Container Corp., 682 N.E.2d 1150, 1156 (Ill. App. Ct. 1997).
66. *See* Scott v. Dreis & Krump Mfg. Co., 326 N.E.2d 74, 87 (Ill. App. Ct. 1975).
67. *Id.*
68. *See* Freislinger v. Emro Propane Co., 99 F.3d 1412, 1417-18 (7th Cir. 1996); *see also* 735 ILL. COMP. STAT. 5/2-1116(c) (2003).

Cremeans v. Willmar Henderson Manufacturing Co.[69] and *Suter v. San Angelo Foundry & Machine Co.*,[70] courts in Ohio and New Jersey barred the assumption-of-risk defense where the employee encountered the risk in the normal course of his employment.[71] Both states apply this liberal doctrine only in work-related situations, to protect a worker who, by the circumstances of employment, is forced to work in an unsafe environment or with unsafe equipment.[72] Other states may reach the same result, recognizing the compulsion of the workplace, but they look to the issue of voluntariness on a case-by-case basis.[73]

According to the court in *Cremeans*, "an employee does not voluntarily or unreasonably assume the risk of injury which occurs in the course of his or her employment when he must encounter that risk in the normal performance of his required job duties and responsibilities."[74] Similarly, the New Jersey court in *Suter* stated 12 years earlier that:

> In our view an employee engaged at his assigned task on a plant machine . . . has no meaningful choice. Irrespective of the rationale that the employee may have unreasonably and voluntarily encountered a known risk, we hold as a matter of policy that such an employee is not guilty of contributory negligence.[75]

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69. 566 N.E.2d 1203 (Ohio 1991).

70. 406 A.2d 140 (N.J. 1979).

71. *See Cremeans*, 566 N.E.2d at 1207; *Suter*, 406 A.2d at 148.

72. *See Cremeans*, 566 N.E.2d at 1207; *Suter*, 406 A.2d at 148.

73. *See, e.g.*, Beacham v. Lee-Norse, 714 F.2d 1010, 1014 (10th Cir. 1983) (en banc); Rhoads v. Serv. Mach. Co., 329 F. Supp. 367, 380-81 (E.D. Ark. 1971); Kitchens v. Winter Co. Builders, Inc., 289 S.E.2d 807-09 (Ga. Ct. App. 1982); Scott v. Dreis & Krump Mfg. Co., 326 N.E.2d 74, 87 (Ill. App. Ct. 1975); Johnson v. Clark Equip. Co., 547 P.2d 132, 140-41 (Or. 1976); Brown v. Quick Mix Co., 454 P.2d 205, 208 (Wash. 1969).

74. *Cremeans*, 566 N.E.2d at 1207.

75. Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140, 148 (N.J. 1979) (adding in a footnote that "[w]e are not herein passing upon other situations wherein an employee may similarly be held to have had no meaningful choice") (internal citations and footnote omitted). *Suter* was a seminal case for many aspects of New Jersey products liability law.

In a concurring opinion, one justice questioned why the doctrine would be limited to an employee operating a plant machine.[76] Indeed, the court did not retain this limitation in later cases and began to apply the doctrine to all workplace injuries.[77] In 1987, the New Jersey legislature recognized this principle in the Products Liability Act.[78] In fact, the once-hesitant concurring justice in *Suter* later favored extending this doctrine beyond the products liability field to other comparative negligence claims against employee-plaintiffs.[79]

Both New Jersey and Ohio limit this doctrine to workers injured on the job as a result of an unsafe environment or defective equipment.[80] These courts recognize that in non-workplace situations the usual assumption of risk standard should apply. The court in *Suter* found that the Comparative Negligence Act applied to products liability actions, but that, in non-workplace accidents, the only form of contributory negligence is that "'which consists in voluntarily and unreasonably proceeding to encounter a known danger.'"[81] Drawing on comment n of the *Restatement (Second) of Torts* section 402A, the court restated the assumption-of-risk doctrine applicable to non-workplace conduct: "Thus, generally where a plaintiff with actual knowledge of the danger presented by the defective product knowingly and voluntarily encounters that risk, a trial court should submit the defense of contributory negligence to the jury."[82] Under negligence standards, the jury will determine whether the actions of the plaintiff in encountering the risk were reasonable; the full test, therefore, is whether a plaintiff both voluntarily and unreasonably encountered a known risk. Where defective products cause workplace injuries, however, the general rule as a matter of public policy is that

76. *See id.* at 166 (Clifford, J., concurring).

77. *See* WILLIAM A. DREIER, JOHN E. KEEFE, SR. & ERIC D. KATZ, NEW JERSEY PRODUCT LIABILITY TOXIC TORT LAW § 16:2-2a (2004) [hereinafter DREIER, KEEFE & KATZ].

78. *See* N.J. STAT. ANN. §§ 2A:58C-1 to -7 (West 2000) (requiring legislative committee statements to be consulted in the interpretation of the Act).

79. *See, e.g.*, Tobia v. Cooper Hosp. Univ. Med. Ctr., 643 A.2d 1, 4 (N.J. 1994); Green v. Sterling Extruder Corp., 471 A.2d 15, 20 (N.J. 1984); *see also* Ramos v. Silent Hoist & Crane Co., 607 A.2d 667, 673 (N.J. Super. Ct. App. Div. 1992) (using hybrid product liability negligence analysis).

80. *See supra* Part I.D.

81. *Suter*, 406 A.2d at 144.

82. *Id.*

the employee's recovery is not barred by both contributory negligence and assumption of risk.[83]

Would facts like those presented in these New Jersey and Ohio cases yield different results in workplace-accident cases in states that recognize assumption of risk as a defense but do not afford the additional protection for on-the-job injuries? The answer is a definite "maybe." In Ohio and New Jersey, most of the questions are answered in advance of trial because the issue almost never goes to the jury. In states where plaintiffs must prove assumption of risk (as in the non-employment settings in Ohio and New Jersey), however, whether the plaintiff acted reasonably by continuing to use the defective machine or by remaining in the area of the dangerous process is a jury question. A competent plaintiff's attorney, facing a jury of working people, can usually present the argument in such a way that a reasonable juror would find that the plaintiff should have continued working with the defective machine rather than have forgone his employment or been labeled a troublemaker.

II. INROADS ON THE EMPLOYEE'S WORKERS' COMPENSATION PROTECTION

Ohio and New Jersey are clearly the most liberal of the United States jurisdictions in addressing the issue of worker protection. The question of how liberal remains to be answered. This Article examines New Jersey law in some detail for an understanding of how far other states may move in this area. New Jersey's Products Liability Act governs some objective aspects of this liability,[84] but insofar as the Act does not provide an absolute defense based on a worker's failure to recognize a usual danger in the workplace,[85] case law still controls.

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83. *See, e.g.*, Conference of Judges, *supra* note 28.

84. *See* N.J. STAT. ANN. §§ 2A:58C-1 to -7 (West 2000).

85. *See id.* § 2A:58C-3(a)(2). The statute reads, in applicable part:

> In any product liability action against a manufacturer or seller for harm allegedly caused by a product that was designed in a defective manner, the manufacturer or seller shall not be liable if . . . . [t]he characteristics of the product are known to the ordinary consumer

There are several aspects to this problem. The New Jersey Supreme Court in *Suter* stated that the employee-protection doctrine was not absolute.[86] The employee must use the machine for its intended or reasonably foreseeable purpose.[87] Thus, deliberate injury by the employee will bar recovery.[88] The court raised a host of unresolved issues, however, when it noted that the foundation for the rule was one of "meaningful choice."[89] New Jersey law, though protective of workers, still admits a defense similar to the assumption-of-risk defenses permitted in other states, which finds its premise in this concept of meaningful choice. Obviously, there are issues as to what choices are meaningful, but workplace compulsion is at the heart of the *Suter* doctrine, and the court must have meant something when it used the term "compulsion." Notwithstanding the many general statements interpreting *Suter* as broadly protecting workers from the consequences of their own conduct, a close analysis of those cases yields a sharply-defined limitation.

This analysis must start with an understanding of two aspects of the law. First, the *Suter* doctrine does not cover a worker who intentionally injures himself.[90] Second, when an employer alters a safety device on a piece of equipment that he knows is likely to injure his employee, the Workers' Compensation Act and *Laidlow v. Harrington Machine Co.* provide that the employer may be liable for an intentional tort if the employee is subsequently injured using that machine.[91] In May 2003, the New Jersey Supreme Court decided

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> or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended, *except that this paragraph shall not apply to industrial machinery or other equipment used in the workplace and it is not intended to apply to dangers posed by products such as machinery or equipment that can feasibly be eliminated without impairing the usefulness of the product* . . . .

Id. (emphasis added).

86. *See Suter*, 406 A.2d at 148 n.6.

87. *See id.* at 148.

88. *See id.* at 148 n.6.

89. *Id.* at 167 n.5.

90. *See id.* at 148 n.6.

91. *See* Laidlow v. Harrington Mach. Co., 790 A.2d 884, 897-98 (N.J. 2002). The New Jersey Supreme Court addressed the consequences of an employer's knowledge of the dangers inherent in an

three cases that further explained this second concept.[92] *Crippen v. Central Jersey Concrete Pipe Co.* differed factually from *Laidlow* in that the employer deceived the Occupational Safety and Health Administration into believing that he had corrected non-compliant conditions.[93] The court applied the *Laidlow* analysis and found that such acts of the employer were not "a part of everyday industrial life" and, thus, did not fall within workers' compensation tort immunity.[94]

The companion case to *Crippen*, *Mull v. Zeta Consumer Products*, also involved a violation of Occupational Safety and Health Act ("OSHA") regulations that required lockout/tagout procedures where prior similar injuries had occurred.[95] The court found that the intentional-wrong exception to workers' compensation law applied when the employer disengaged a safety device in knowing disregard of the dangerous consequences of this action.[96] Even though the employer here did not deceive the Occupational Safety and Health Administration, the employer's active conduct, and knowledge of the machine's dangers gleaned from prior accidents, employee complaints, and OSHA violation notices went beyond normal industrial life. Thus, the court found that the workers' compensation bar did not apply.[97]

Tomeo v. Thomas Whitesell Construction Co. is an anomaly. It involved an employer-owned snow blower with the safety lever taped into an operational position.[98] The court assumed for the sake of argument that the employer had taped the safety lever.[99] Although the court repeatedly cited the New Jersey Products Liability Act to

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employee's use of an altered machine in the context of a workers' compensation claim. *See id.* at 887. Immunity from suit in tort does not apply to employers who intentionally injure their employees under New Jersey law. N.J. STAT. ANN. § 34:15-9 (2003).

92. *See* Crippen v. Cent. Jersey Concrete Pipe Co., 823 A.2d 789, 797-98 (N.J. 2003); Tomeo v. Thomas Whitesell Constr. Co., 823 A.2d 729, 773-79 (N.J. 2003); Mull v. Zeta Consumer Prods., 823 A.2d 782, 784-86 (N.J. 2003).

93. *See Crippen*, 823 A.2d at 797-98.

94. *Id.* at 798.

95. *See Mull*, 823 A.2d at 783. Lockout/tagout procedures control the release of hazardous energy when a worker is cleaning or maintaining equipment or machinery. *Id.*

96. *See id.* at 786.

97. *See id.*

98. *See* Tomeo v. Thomas Whitesell Constr. Co., 823 A.2d 729, 770 (N.J. 2003).

99. *See id.* at 776.

demonstrate New Jersey's objective standards, the court focused on the totality of the circumstances rather than applying the statutory standards.[100] The result is in sharp and otherwise unexplained opposition to its treatment of job-related accidents.

First, the court blurred the distinctions between design defects and warning defects by removing the snow blower from the general classification of industrial production machinery and determining that the snow blower was a typical consumer product that the employee understood.[101] The court next noted that, although *Suter* bars any consideration of the plaintiff's on-the-job conduct, such conduct is relevant to the analysis of the "context prong [of the *Laidlow* rule] and as an intervening-superceding cause that affects the substantial certainty prong as well."[102] The court then determined that the warning labels were adequate as a matter of law "regardless of whether [the] plaintiff recall[ed] seeing them."[103] The court concluded that, even assuming that the employer had immobilized the safety device, there was no design, manufacturing, or warning defect within the meaning of the Products Liability Act.[104] Any breach of a duty to train the plaintiff in the proper use of the snow blower could not exceed negligence or gross negligence, and therefore fell short of the "intentional wrong" requirement of the workers' compensation law.[105]

In explaining its reasoning, the court reviewed the statutory objective standards of the "obvious danger/consumer expectation" defense (protecting manufacturers of consumer goods), but then removed this snow blower (as a consumer product) from the statutory exception for "industrial machinery or other [production] equipment used in the workplace."[106] The court reasoned that where an employee alleges that his employer committed an intentional tort, the

100. *See id.* at 773-76.
101. *See id.* at 776.
102. Tomeo v. Thomas Whitesell Constr. Co., 823 A.2d 769, 776 (N.J. 2003).
103. *Id.* (citing N.J. STAT. ANN. § 2A:58C-4 (West 2003)).
104. *See Tomeo*, 823 A.2d at 777.
105. *Id.*
106. *See id.* (quoting N.J. STAT. ANN. § 2A:58C-3a2(2) (West 2003)).

statutory products liability test should apply if a consumer product is the equipment involved in the workplace accident.[107]

The New Jersey Supreme Court has explicitly refused to adopt a *per se* rule that an employer commits an intentional tort when it disables a safety device.[108] *Laidlow*, *Crippen*, and *Mull* all involved OSHA violations, but the employees' violations of OSHA in those

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107. *See id.* This makes little sense. Protective consumer-product rules should not be used to defeat a worker's claim under protective workplace rules. In any event, the characterization of the snow blower in *Tomeo* as a consumer product is questionable because the item takes on a different function when used in an industrial setting. An employee faced either with using a machine with a taped-down safety switch or not working has a job-related compulsion to proceed without the manufacturer's protection in place; under *Suter*, courts should disregard the employee's momentary inattention, or even his active negligence (as demonstrated in *Tomeo*). *See* Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140 (N.J. 1979); *Tomeo*, 823 A.2d at 780 (Albin, J., dissenting); *see also* Cavanaugh v. Skil Corp., 751 A.2d 564, 595 (N.J. Super. Ct. App. Div. 1999), *affirmed in relevant part*, 751 A.2d 518 (N.J. 2000) (noting that dangers from a hand-held saw required a similar rule to that applying to a "freestanding stationary machine"); Crumb v. Black & Decker, 499 A.2d 530, 532-33 (N.J. Super. Ct. App. Div. 1985) (where the machine was a hand-held rotary saw that the employee brought from home, "[t]he essence of the Suter rule is that the employee had no meaningful choice").

Certainly, if the snow blower had been manufactured without the safety switch, the manufacturer would have been liable for injuries caused by the defective product. The purpose of the safety device was to prevent the very injury that occurred here, and thus New Jersey law would not have recognized the employee's actions as a bar to recovery. *See* Bexiga v. Havir Mfg. Corp., 290 A.2d 281, 286 (N.J. 1972); *Suter*, 406 A.2d at 167 (Clifford, J., concurring). For this reason, the exception for industrial machinery or other equipment used in the workplace exists in the New Jersey Products Liability Act. The Senate Judiciary Committee statement contained in the Act states:

> This rule is intended to apply to familiar consumer products of the kind identified in comment i to section 402A of the Restatement (Second) of Torts [sic]. It is not intended . . . to apply to other products . . . such as machinery or equipment that can feasibly be eliminated without impairing the usefulness of the products[] because such dangers are not "inherent."

N.J. STAT. ANN. § 24:58C-1a (West 2000).

The legislature directed the courts to consult these Committee Statements in the interpretation and construction of New Jersey Products Liability Act. N.J. STAT. ANN. § 2A:58C-1(a) (West 2000). There is no exception in the statute for a consumer product when used in the workplace. *See id.* § 2A:58C-3(a)(2); McWilliams v. Yamaha Motor Corp. U.S.A, 987 F.2d 200, 204-05 (3d Cir. 1993); DREIER, KEEFE & KATZ, *supra* note 77, § 14:3-2b.

If the employer disabled the safety switch, it created the equivalent of a serious design defect, as if it manufactured a product without a safety device. This thus belies the court's statement that there was no claim of a defect with respect to the design of the product within the meaning of New Jersey Products Liability Act.

108. *See Tomeo*, 823 A.2d at 774; Crippen v. Cent. Jersey Concrete Pipe Co., 823 A.2d 789, 796 (N.J. 2003); Mull v. Zeta Consumer Prods., 823 A.2d 782, 788 (N.J. 2003); Laidlow v. Hariton Mach. Co., 790 A.2d 884, 898 (N.J. 2002). The courts held that sufficient evidence existed to create a jury question as to whether the employer had committed an intentional tort in three of the cases in which the employer had disabled a safety device.

cases were not determinative of their employers' liability for the commission of intentional torts against their employees.[109]

Tomeo was a 4-2 decision, and its author has now retired from the court. Another of the majority justices will retire in August 2004. At least two justices already favor a *per se* rule. The New Jersey Supreme Court might well be expected to adopt either a *per se* rule, or an exception to workers' compensation immunity where the employer disengaged a safety device, at least where the employer might have expected serious injuries to occur.

III. POSSIBLE INROADS INTO THE NEW JERSEY STRONG BAR AGAINST CONSIDERING A WORKER'S CONDUCT

Because *Laidlow* and its progeny expanded the interpretation of an intentional injury and imposed tort liability on an employer who removed a safety device on a piece of equipment that injured his employee, an extrapolation of this concept to some limited forms of a worker's own conduct is justifiable. In fact, courts have already recognized the employee's duty to refrain from implicitly intending to injure himself. Employees should be responsible for their conscious choices that are practically certain to cause injury when the employer did not require these choices as a condition of employment. In all fairness, the employer and employee doctrines should be parallel.

Laidlow allows an employee to make a claim against his employer for an injury that resulted from the employer's intentional disengagement of a safety device.[110] Similarly, an employee who actively disengages a safety device should not escape the

109. *See Crippen*, 823 A.2d at 799; *Mull*, 823 A.2d at 783; *Laidlow*, 790 A.2d at 889; *see also* Calderon v. Machinenfabriek Bollegraaf Appingedam BV, 667 A.2d 1111, 1118 (N.J. Super. Ct. App. Div. 1995) ("[W]e could envision liability on the part of a corporation whose management personnel or other employees have removed safety devices so that the risk is raised to such a high level that it is practically certain that some employee would be injured." (citing Millison v. E.I. du Pont DeNemoors & Co., 501 A.2d 505 (1985))). The court in *Laidlow* specifically approved of the decision in *Mabee v. Borden*, 720 A.2d 342, 348 (N.J. Super. Ct. App. Div. 1998). *Laidlow*, 790 A.2d at 895.

110. *See Laidlow*, 790 A.2d at 897-98.

consequences of his action.[111] Courts should treat conscious and deliberate actions that are practically certain to cause injury similarly, whether raised by the employer as a defense to a *Laidlow* negligence claim by the worker or by a third party such as a product manufacturer. Of course, if the employer expressly or tacitly requires, fosters, facilitates, or approves the employee's actions, a court would be less likely to consider the employee's choice to have been voluntary. Instead, a court is likely to find that the employer coerced the employee because the worker's failure to subscribe to the employer's standards would have jeopardized his employment. Such workplace compulsion was central to the New Jersey Supreme Court's analysis in *Suter*.[112]

In *Suter*, the court held that an employee is not contributorily negligent even when "unreasonably and voluntarily" encountering a known risk.[113] The court, however, did not discuss the effect of an employee's conscious creation of a new risk against the employer's rules or against the manufacturer's directions. While manufacturers have the duty to guard against both intended uses and reasonably anticipated misuses,[114] may an employee who chooses to create or materially increase a risk associated with a piece of equipment, perhaps to increase his piecework pay, do so without impacting on the determination of his liability? At the very least, there should be an apportionment of responsibility.

There are usually three protagonists in this equation: the employee, the employer, and the manufacturer of the defectively-designed machine. The logical extension of *Laidlow* and its progeny is that the manufacturer of a defective machine remains comparatively liable but that there be an assessment of an employee-plaintiff's deliberate conduct. There would still be recovery for injuries the employee received as the result of a defective machine, but the assessment

111. A court would find that an employee was practically certain that use of a particular piece of equipment would result in injury, based on his course of conduct prior to his injury. *Cf. id.* at 897.

112. *See Suter*, 406 A.2d at 148.

113. *Id.*

114. *See id.* at 144; Jurado v. W. Gear Works, 619 A.2d 1312, 1319 (N.J. 1993); DREIER, KEEFE & KATZ, *supra* note 77, § 8:2-3c.

would include the employee's fault, applying standards similar to those governing his ability to make a claim against his employer for actions that avoid the workers' compensation bar.[115] If courts are to apply negligence standards uniformly, the law should not omit the third party, the employee. The courts should uniformly apply negligence standards to all of the parties despite some of the current understandings of the broad statements of employees' non-liability in *Suter*, which appear to have been written in cases where this quasi-intentional conduct by the employee was never raised as an issue.[116]

Two hypothetical examples best demonstrate this principle. Assume that a worker deliberately and consciously fails to use protective glasses when operating a high-speed grinding wheel. His employer has a strict rule requiring the use of these glasses, and employees know that the employer disciplines employees who violate this rule. The employer, knowing of the substantial certainty of an injury, also encourages the use of grinding wheels beyond their rated life and at speeds exceeding the manufacturer's specifications, which may be unclear. Assume, further, that the manufacturer has defectively designed the wheel by using an inappropriate bonding agent. If the wheel explodes and severely injures a worker's eye, workers' compensation is available to the worker, but the injury implicates issues far greater than the workers' compensation remedy.

Second, assume a window washer was injured when working on a defectively-designed platform that tilted, causing him to fall. The employer had removed an OSHA-required safety railing and the worker deliberately refused to use a safety harness that the employer required all workers to wear. Again, apart from the workers' compensation remedy, should courts not consider the actions of all three parties?

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115. *See generally* Dreier & Lavigne, *supra* note 1.

116. Some of the author's own published opinions on this subject could be misread to foster this problem, even though it was never raised. *See, e.g.*, Congiusti v. Ingersol-Rand Co., 703 A.2d 340, 343-44 (N.J. Super. Ct. App. Div. 1997); Ramos v. Silent Hoist & Crane Co., 607 A.2d 667, 672-73 (N.J. Super. Ct. App. Div. 1992); Tirrell v. Navistar Int'l, Inc., 591 A.2d 643, 648-49 (N.J. Super. Ct. App. Div. 1991); Crumb v. Black & Decker, 499 A.2d 530, 533 (N.J. Super. Ct. App. Div. 1985).

Courts have traditionally understood *Suter* to mean that employees injured by equipment at their workplace are protected from any claim of contributory negligence.[117] Pre-*Laidlow*, New Jersey courts viewed workers' compensation laws as protecting employers from any tort liability unless the employer intentionally caused the employee's injury.[118] In such an instance, even if the employer is 95% responsible, the third-party manufacturer of the defective wheel bears 100% of the financial liability unless the manufacturer proves that the employee misused the product that caused his injury.[119]

Laidlow and its progeny add the employer to the equation, but what standards should apply to the employee? A close reading of several cases shows that the courts may already be providing a path to consider the employee's conduct. As noted earlier, *Suter* holds that the purpose is to protect the employee who had "no meaningful choice."[120] In *Cavanaugh v. Skil Corp.*,[121] the New Jersey Appellate Division noted that the *Suter* rule has limitations, even though the courts often state that rule in broad terms.[122] The court in *Skil Corp.* stated that "the essence of *Suter* is whether the employee had a meaningful choice [and thus certain] type[s] of conduct [are] not exempted by *Suter* or *Tirrell*."[123] The court found that intentionally circumventing a safety device might appropriately be analyzed as a type of misuse "which really goes to the issue of proximate cause."[124]

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117. *See Suter*, 406 A.2d at 140; *see also Ramos*, 607 A.2d at 672; *Tirrell*, 591 A.2d at 648-49; *Crumb*, 499 A.2d at 533.

118. *See* Laidlow v. Hariton Mach. Co., 790 A.2d 884, 886-87 (N.J. 2002) (discussing *Millison v. E.I. Du Pont de Nemours & Co.*, 501 A.2d 505 (1985)). An exception to this principle applies if the employee willfully failed to use a "reasonable and proper personal protective device or devices furnished by the employer, which has or have been clearly made a requirement of the employee's employment by the employer and uniformly enforced and which an employer can properly document that despite repeated warnings, the employee has willfully failed to properly and effectively utilize," and this failure "is the natural and proximate cause of injury or death." N.J. STAT. ANN. § 34:15-7 (West 2000). In such an instance, the employee is barred from receiving workers' compensation benefits for the accident. *Id.* This hypothetical does not involve facts that implicate this exception.

119. *See, e.g.*, Stephenson v. R. A. Jones & Co. Inc., 510 A.2d 1161, 1162 (N.J. 1986).

120. *Suter*, 406 A.2d at 148.

121. 751 A.2d 564 (N.J. Super. Ct. App. Div. 1999).

122. *Id.* at 593.

123. *Id.* at 595 (finding that an employee who wedged open a guard put into place for his protection "voluntarily proceeded to encounter a known risk--a risk that he had purposefully created").

124. *Id.* at 596; *see also* DREIER, KEEFE & KATZ, *supra* note 77, § 16:2-2.

Additional authority supports this proposition. The court in *Schwarze v. Mulrooney*[125] noted that the plaintiff-employee had the option of preventing the injury and that "[t]he jury could reasonably have found from the evidence that plaintiff had a 'meaningful choice' whether to ameliorate the risk."[126] Similarly, in *Butler v. PPG Industries, Inc.*,[127] the plaintiff, in attempting to find a leak in a trailer tank at the request of his employer, used a chemical that he knew to be corrosive.[128] Despite his knowledge of the dangerous characteristics of the chemical, his prior training in the use of the chemical, and his employer's request that he wear the appropriate safety gear, the plaintiff chose to use the chemical without wearing the safety gear.[129] Because the plaintiff was under no suggestion, practice, direction, or compulsion from his employer to use the chemical in this manner in order to accomplish his assigned task, the appellate court could not justify a rigid invocation of the *Suter* rule to exculpate him from his voluntary and unreasonable encounter with a known risk.[130]

Del Tufo v. Township of Old Bridge[131] contains an even more direct statement by the New Jersey Supreme Court: "*Suter* . . . recognized that the Comparative Negligence Act should apply to injuries occurring even in the workplace when a plaintiff's conduct may be found to constitute contributory negligence in the sense of *deliberately* and unreasonably proceeding to encounter a known danger."[132] The court in *Del Tufo* added this concept of deliberation to the non-employee liability formula; only a *deliberate* act limits the *Suter* rule.[133]

125. 677 A.2d 1144 (N.J. Super. Ct. App. Div. 1996).

126. *Id.* at 1148; *see also* Ramos v. Silent Hoist & Crane Co., 607 A.2d 667, 674 n.6 (1992). The court in *Schwarze* did not resolve the issue, however, because of an evidentiary problem. *See Schwarze*, 677 A.2d at 1150.

127. 493 A.2d 619 (N.J. Super. Ct. App. Div. 1985).

128. *See id.* at 622.

129. *See id.*

130. *See id.*

131. 685 A.2d 1267 (N.J. 1996).

132. *Id.* at 1280 (emphasis added).

133. *See id.* No statement in any subsequent case, text, or article has identified this clarification by the New Jersey Supreme Court.

Finally, the New Jersey Supreme Court has recognized that an employee who seeks to avoid the workers' compensation bar by alleging intentional conduct on the part of the employer has certain duties of self-protection.[134] "Our law does not impose a duty on an employer to prevent an employee from engaging in self-damaging conduct absent a showing that the employer encouraged such conduct or concealed its danger."[135] Furthermore, a principal New Jersey products liability text warns that cases expounding overly broad protection for employee-plaintiffs "should not be misread to posit a general rule that no workplace conduct by a plaintiff may be considered as comparative fault."[136]

These cases and other authorities support the proposition that protection under *Suter* is not absolute; where a plaintiff has deliberately and consciously either disengaged a safety device or discarded a protective device, he does not deserve the protection of the doctrine. In cases where courts have declined to apply the *Suter* doctrine, the employee has either substantially intensified the risk already present or has created a new risk.[137]

However, *Colella v. Safway Steel Products*[138] demonstrated that the principle of meaningful choice does have limits. *Colella* involved a worker required to climb scaffolding to access a platform.[139] As the head pipefitter on the job, the employee had the supervisory authority to decide to use separate access ladders that his employer could have provided if the employee had made a telephone request to the employer.[140] The employee instead chose to climb the scaffold in the same manner as other workers, even though its rungs were unevenly

134. *See* Tomeo v. Thomas Whitesell Constr. Co., 823 A.2d 769, 777 (N.J. 2003); *supra* note 107 and accompanying text.

135. *Tomeo*, 823 A.2d at 777. Courts use an objective standard to determine whether a user of consumer goods has engaged in proper self-protective measures. *Id.* The Products Liability Act standards in the New Jersey Statute Annotated section 2A:58C-3(a)(2) "apply when a consumer product is involved in an 'intentional wrong' under [the Workers' Compensation Act]." *Id.*

136. DREIER, KEEFE & KATZ, *supra* note 77, § 16:2-2.

137. *See* text accompanying notes 120-36.

138. 493 A.2d 634, 636 (N.J. Super. Ct. Law. Div. 1985), *overruled by* Tirrell v. Navistar Int'l, Inc., 591 A.2d 643, 648 n.8 (N.J. Super. Ct. App. Div. 1991).

139. *See id.* at 635.

140. *See id.* at 637.

spaced.[141] The court determined that the employee had a meaningful choice in that he could have requested the additional ladders.[142] The court overlooked the fact that the employer did not tell the employee to use the ladders, and if the employee had chosen to wait for the new ladders to arrive, he would have delayed the job for some time and stood out as an employee who was unwilling to take the same risks as those working around him. Nonetheless, the judge held as a matter of law that the plaintiff was not entitled to the protection of the *Suter* doctrine.[143] The appellate division overruled this decision by relying on *Suter* and *Crumb v. Black & Decker*.[144] The court in *Colella* never implied that the plaintiff was free from the usual pressures of performing his job when he decided to climb the scaffold without a readily available protective alternative. Thus, the plaintiff in *Colella* should have been entitled to the workplace-compulsion protection of *Suter*.

In *Ramos v. Silent Hoist & Crane Co.*,[145] a seaman aboard a ship preparing to dock hailed the plaintiff, whose employer had sent him to move cars in a parking lot next to the pier.[146] The seaman indicated that he wanted to throw a line to the plaintiff and have him hook the line to a capstan near where the plaintiff was standing.[147] The plaintiff had seen this procedure many times in the past and knew that the capstan rotated when a switch on the other side of the dock was activated.[148] Seeing that no other employee was available, the plaintiff caught the thrown line and activated the capstan, which in turn pulled a large hawser that moored the ship to the dock.[149] Unfortunately, the plaintiff stood too close to the capstan; the lines wrapped around the plaintiff and crushed him against the capstan, which caused severe injuries before other employees could turn off

141. *See id.*
142. *See id.*
143. *See id.*
144. *Tirrell*, 591 A.2d at 648-50; *see also supra* note 117.
145. 607 A.2d 667 (N.J. Super. Ct. App. Div. 1992).
146. *See id.* at 668-69.
147. *See id.*
148. *See id.* at 669.
149. *See id.*

the switch.[150] There was no emergency release at the capstan itself.[151] In this case, the plaintiff certainly had some form of choice. He could have declined to catch the line and requested that his employer send additional personnel. Thinking that there was a need for immediate action, however, the plaintiff proceeded, untrained in the use of a capstan or the usual safety procedures. The employee did not lack a meaningful choice as did the employee in *Suter*, and this case evinced a need to relax the *Suter* rule. Instead, the plaintiff performed the job as he understood it, even though he may have been incorrect.[152] He did not deliberately forego any safety device that the employer provided for him or instructed him to use.[153]

Would Ohio, the only other state to adopt the protection of the *Suter* doctrine, follow the analysis of the New Jersey courts? Would New Jersey, which has not yet spoken definitively on the subject, modify *Suter* to reach the conduct of the worker in *Ramos*? The answer is a probable but not definitive "yes." New Jersey courts have recognized in *Laidlow* and its progeny that intentional conduct on the part of the employer includes deliberate conduct that ensures with practical certainty a particular result.[154] *Laidlow* held that this deliberate conduct need not immediately produce an injury and that months or years might pass before the injury occurs.[155] If an employer can be liable for simply removing a safety device necessary to protect a worker from the substantial certainty of an injury,[156] then a worker who hides from his employer that he has deliberately chosen not to use the same safety device should bear an equivalent risk, even though the product may also be defective. Such deliberate action of creating a substantial risk or materially intensifying an

150. *See Ramos*, 607 A.2d at 669.
151. *See id.*
152. *See id.* at 674.
153. *See id.* at 668-69.
154. *See supra* note 109 and accompanying text.
155. *See* Laidlow v. Hariton Mach. Co., 790 A.2d 884, 897-98 (N.J. 2002).
156. Mabee v. Borden, Inc., 720 A.2d 342, 349 (N.J. Super. Ct. App. Div. 1998); *see also Laidlow*, 790 A.2d at 894-96 (endorsing the *Mabee* decision).

existing risk should permit relaxation of the *Suter* doctrine. *Del Tufo* and *Cavanaugh* appear to presage such a result.[157]

CONCLUSION

New Jersey courts have thrived on refining doctrines to achieve symmetry and to make the law more of a seamless web. Progress in the area of non-liability for employee conduct should not equate the *Suter* doctrine with the doctrines adopted in those states that reject comparative fault or stringently apply assumption of risk without examining the practical realities of the workplace. Compassion and use of risk-spreading doctrines have been hallmarks of New Jersey jurisprudence since *Henningsen v. Bloomfield Motors, Inc.*[158] All that students of the law in this area can be practically sure of is that the common law is adaptive, yielding slowly to social and economic pressures. Will states such as Virginia, North Carolina, and Alabama move to a more centrist position? Will New Jersey and Ohio do the same? This remains to be seen.

157. *See supra* notes 121-24, 131-33.

158. 161 A.2d 69 (N.J. 1960).